STATE OF MICHIGAN

COURT OF APPEALS

LUCILE WILBURN,

Plaintiff-Appellant,

v

BUILDERS SQUARE, INC.,

Defendant-Appellee.

UNPUBLISHED
August 20, 1999

No. 210260
Oakland Circuit Court
LC No. 97-537877 NO

Before: Kelly, P.J., and Jansen and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff was seriously injured when she tripped and fell over the wooden pedestal base of a sign that protruded into the aisleway in which she was shopping. Plaintiff's daughter, who was with plaintiff in the store, testified that the base was made of dark wood and extended about eighteen inches into the aisleway. According to the daughter, the aisleways were crowded with sale merchandise in the garden shop in which they were shopping, and that the sale merchandise appeared to be in that area in order to provide shelf room in the main area of the store. Plaintiff later filed suit, alleging claims of failure to warn and failure to maintain the premises in a reasonably safe condition. The trial court held that the pedestal presented an open and obvious danger and dismissed the entire cause of action on that basis.

A trial court's decision concerning a motion for summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for the claim. *Spiek, supra,* p 337. The court considers the affidavits, pleadings, depositions, admissions, and any other documentary evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.* A motion for summary disposition is properly granted when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiff initially argues that the open and obvious doctrine applies only to failure to warn cases, and, therefore, it was error for the trial court to dismiss anything but her failure to warn claim based on a determination that the pedestal was open and obvious. This Court has recently held that the open and obvious doctrine applies both to claims that a defendant failed to warn about a dangerous condition and that the defendant failed to maintain the premises in a reasonably safe condition. *Millikin v Walton Manor Mobile Home Park, Inc*, 234 Mich App 490, 495; ___ NW2d ___ (1999). The *Millikin* holding is binding under MCR 7.215(H) and we are bound to follow it. Therefore, we are compelled to conclude that the open and obvious doctrine applies to both of plaintiff's daims (failure to warn and failure to maintain the premises in a reasonably safe condition).

However, even where a danger is open and obvious, a landowner still may have a duty to protect an invitee against foreseeably dangerous conditions if the risk of harm remains unreasonable despite its obviousness or despite knowledge of it by the invitee. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995); *Millikin, supra*, p 498. "Thus, the open and obvious doctrine does not relieve the invitor of [the] general duty of reasonable care." *Bertrand, supra*, p 611. Our Supreme Court in *Bertrand, id.*, stated:

> [T]he rule generated is that if the particular activity or condition creates a risk of harm *only* because the invitee does not discover the condition or realize its danger, then the open and obvious doctrine will cut off liability if the invitee should have discovered the condition and realized its danger. On the other hand, if the risk of harm remains unreasonable, despite its obviousness or despite knowledge of it by the invitee, then the circumstances may be such that the invitor is required to undertake reasonable precautions.

Defendant argues that the facts of this case are indistinguishable from those in the companion case to *Bertrand, Maurer v Oakland Co Parks & Recreation Dep't*, because there, the plaintiff's only basis for contending that the step was unreasonably dangerous despite its obviousness was that she did not see it. See *id.*, p 621. Here, defendant contends that plaintiff likewise bases her argument that the pedestal was unreasonably dangerous on the simple fact that she failed to see it. We disagree. The accident in this case took place in a store, where plaintiff failed to see the pedestal because she was looking at a hanging basket floral display instead of watching the floor for obstacles. Store owners create displays with the express purpose of attracting customers' attention in order to generate interest and, thereby, sales. Defendant should anticipate that leaving items in the aisleway of a store, especially where so much merchandise is displayed at or above eye level, could cause patrons to trip and injure themselves. See, e.g., *id.*, p 624 (there was a genuine issue regarding whether the construction of the step, when considered with the placement of vending machines and a cashier's window, and the hinging of the door, created an unreasonable risk of harm despite the obviousness of the danger). Summary disposition was inappropriate because a reasonable jury could conclude that the risk of harm was unreasonable despite its obvious nature.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kathleen Jansen
/s/ Helene N. White